STATE OF MINNESOTA

OFFICE OF HEARING EXAMINERS

FOR TEE MINNESOTA ENERGY AGENCY

in the Matter of the Proposed Amendment of the Rule of the Minnesota Energy Agency Governing Filing Fees for Applications for Certificates of Need for Large Electric Generating Facilities and Large High Voltage Transmission Lines, 6 MCAR Sec. 2.0605.

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing before Allan W. Klein, duly appointed Hearing Examiner, on May 11, 1979, at the Veterans Service Building, Saint Paul, Minnesota.

This was a rules hearing pursuant to Minn. Stat. Ch. 15, held to determine whether a proposed amendment to an existing rule should be adopted.

Representing the Minnesota Energy Agency (hereinafter "the Agency") were David L. Jacobson, Manager, Certificate of Need Activity, and Dwight S. Wagenius, Special Assistant Attorney General.

Only four of the public appeared at the hearing. The hearing Continued until all persons had an opportunity to be heard. The record remained open until May 18, 1979 for the submission of comments. Only one was received.

Pursuant to Minn. Stat. Sec. 15.0412, subd. 4, this Report shall be available to all affected persons for review Lot at least five working days before the Agency takes any final action on the proposed amendment.

the Agency shall, if it proposes to adopt the amendment as

or otherwise amended, submit a copy of the Order Adop-

ting Rules, a copy of any additional Agency findings, a copy of the Rules

as originally and a copy of the Rules as adopted to the Chief

Hearing Examiner for review pursuant to Minn. Stat. Sec. 15.052, subd . 4.

The to the Chief Hearing Examiner shall precede review by the

Attorney General. The Chief Hearing Examiner shall complete his review and submit his to the Agency on the issues of substantial change in the

rule and with Stat. Sec. 15.0412 within ten calendar days.

The Agency will be responsible for filing the rules withi the Attorney Gen-

persons who have indicted that they wish to be no- eral and For notifying tified of such filing. Three of the tour persons appearing at the hearing

did that- they to be notified of such filing.

indicate
.Based upon all records and proceedings herein, The Examiner makes the

following:

FINDINGS OF FACT

1. on 26, 1979, the Agency filed the following documents with

the Chief Hearing Examiner

(a) A copy of the proposed rules.
(b) The Order for Hearing Proposed to be issued.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number or persons expected to attend the hearing and estimated length of the Agency's Presentation.

2. On April 9,1979, a Notice of Hearing and a copy of the proposed rules were published at 3 State Register 1853.

3. On April 9, 1979, the Agency mailed the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such notice.

4. On April 13, 1979, the Agency filed the following documents:

(a) The Order for Hearing.
(b) The Notice of Hearing as mailed.
(c) The Affidavit of Receipt of the Secretary of State's list.
(d) The Affidavit of Mailing the Notice to all on the Secretary of State's list.
(e) The Secretary of State's Certificate and list.
(f) The Statement of Need and Reasonableness.
(g) The names of Agency personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.

The documents were available for inspection at the office of Hearing Examiners from the date of filing to die date of the hearing.

5. On April 9, 1979, the Agency published an abbreviated Notice of Hearing in the EQB Monitor, Volume 3, Issue 40, at page 130.

Background and description of the Proposed Amendment

6. Minn. Stat. Sec. 116H.13, subd. 6, read as follows at the time of the hearing:

> Any application for a certificate of need shall be accompanied by a fee not to exceed $50,000. The director shall establish by regulation pursuant to chapter 15 and sections 116H.01 to 116H.15, a schedule of fees based on the output or capacity Of the facility and the difficulty of assessment of need. funds c lected in this manner shall be credited to the general fund of the state treasury.

It was amended during the 1979 Special Session. See Finding No. 12, below.

7. Pursuant to that statute, the Agency did, in September of 1975, adopt a rule which is now numbered 6 MCAR Sec. 2.0605. The rule has remained unchanged to date, and reads in pertinent part as follows:

Sec. 2.0605 Filing fees and payment schedule

A. The fee for processing an application shall be:

1. $10,000 plus $50 for each megawatt of plant capacity for LEGF'S; or

2. $10,000 plus $40 per kilovolt of design voltage for LHVTL'S;

plus such additional tees as are reasonably necessary for completion of the evaluation of need for the proposed facility. In no event shall the total fee required of any applicant exceed $50,000.

8. The sole change which the Agency is proposing to make in this rules hearing is to delete the last sentence of paragraph A., which limits the total tee to $50,000. it the Agency's proposed amendment were to be adopted, there would be no maximum dollar amount of the fee in the rule, but the remaining provisions of paragraph A. would define the fee to be charged.

Statutory Authority

9. The Agency's authority to make the proposed change is found in Minn. Stat. secs. 116H.08(a), and 116H.13, subd. 6. The first of these

broadly emmpowers the Director of the Agency to "adopt rules . . . necessary to carry out the purposes of sections 116H.01 to 116H.15". the second is quoted above. The Examiner specifically finds that the Director does have authority to adopt the proposed amendment.

Agency justification for Proposed_Amendment

10. The Agency pointed out in its statement of Need that Minn. Stat. sec. 116H.13, subd. 6, sets forth two criteria which the Director should consider in establishing a fee schedule. Those criteria are (a) output or capacity of the facility, and (b) the difficulty of assessment of need. The Agency stated at the hearing that the philosophical approach of requiring applicants to pay such an application fee indicated a legislative intent that the Certificate of Need program operate on a "pay as you go" basis. in addition, the Agency pointed out that Minn. Stat. sec. 16A.128 requires adjustment of fees at least once each six months so that the total fees received will approximate the amount appropriated for various funds, such as the Certificate of Need activity. The Agency did not provide any documentation of approval from the Commissioner of Finance, however, in light of the fact that the statute had not been changed at the time of the hearing, such approval might have been premature.

11. The pointed out that at least two applications for Certificates; of have resulted in Agency costs in excess of $50,000, and at the hearing, they revised that statement to indicate that a third Certificate of (which had not yet been concluded) also appears to have exceeded the $50,000 limitation. The Agency believes that future costs of proceedings for large electric generating facilities and large high voltage transmission lines will cause more and more proceedings to exceed the $50,000 limitation. The reason for this belief is the substantial increase in the public's concern about such facilities and a concomitant increase in the public's awareness of, and participation in, the Certificate of Need process.

12. For the reasons stated above, the Agency has also proposed that the statutory limitation of $50,000 be revised upward. At the hearing, the

Agency introduced the most recent version of House File 990 (Agency Ex. 7) which, in sec. 13, does delete the $50,000 limitation and substitutes a maximum limitation of $100,000 for certain proceedings. At the time of the hearing, this bill had passed the House and was scheduled for hearing in the Senate. It did not pass during the regular session, but it did pass during the Special Session as S.F. No. 2. The new law provides that the maximum fee shall he $100,000 for certain electric power generating plants and certain high voltage transmission lines. In all other cases, the maximum fee will remain at $50,000.

13. In addition to the above, the Agency pointed out that Minn. Stat. sec. 15.0412, subd. 1, expressly discourages duplication of statutory language in rules. In this particular case, the Agency suggested that to continue the duplication would require that a hearing (such as this one) be held whenever the Legislature changes the Statutory Maximum, and that because of the "lead tine" necessary to amend rules, the Agency could be

caught in a situation where the Legislature had acted, but- the old rule still limited the Agency. theretore, the Agency believes it is best for the rule to contain no maximum fee.

14. In addition to the anticipated increase in costs of Certificate of Need proceedings discussed above, the Agency out that addition- al costs have been imposed because of new responsibilities in connection with these proceedings. At the thin that the current tee schedule was adopted, there was no absolute requirement that an environmental report be prepared in conjunction with applications for large electric generating facilities. However, the Agency is now required to prepare such reports for each such facility with a capacity in excess of 50 megawatts, and for every transmission line. While the Statement of Need estimates that $20,000 is a conservative estimate of the cost of each such report, at the hearing it was stated that the Agency now believes (based on its most re- cent experiences) that $30,000 to $40,000 would he a conservative estimate.

Public Comments

15. Two public witnesses testified at the hearing. The first was Paul Ims, a citizen residing in Echo, Minnesota. The second was Martha Ballou, Staff Director, Minnesota Citizen Action (MCA). Ims discussed the proposed amendment in terms of the broader impact of existing and future energy policies of the State on agricultural, environmental and social grounds. He stated that the Certificate of Need process, in its present font, lacks credibility because of the erroneous forecasts presented in certain past proceedings, and believes that those errors were brought to light by private citizens who participated in the process. He feels, how- ever, that, under the present system, private citizens are placed at a severe disadvantage vis-a-vis Applicants because the citizens lack the financial resources and people power to effectively participate in the process.

Ims urged that the current rule be retained unless an adequate system of financing citizen participation is developed. He recommended that the Director of the Agency initiate a series of state-wide hearings to develop a system for financing adequate citizen participation, but that if such a system could not be implemented, the Certificate of Need process loses much of its meaning, and the costs of the process ought to he limited as much as possible. To use his own words:

> In the event that an adequate system of financing citizen participation in the Certificate of Need hearings is not developed, it is recommended that the current $50,000 limitation be retained, since without adequate citizen participation, it would appear that $50,000 is already a dear sum for obtaining a decision that is probably already predetermined, and which cost gets passed on to the consumers.

16. In addition to voicing his primary concern relating to the need for a system of financing public participation in order to obtain meaningful proceedings, Ims also recommended that Minn. Stat. sec. 116H.13, subd. 3, be amended. That subdivision sets forth the standards to be used by the Director in assessing need for a proposed facility. Ims suggests that an additional standard he added, as follows:

(9) Socially and environmentally detrimental effects of large coal-fired and nuclear-power electric generating plant.

Ims stated that the statutory change was needed because:

> . . . adequate standards have not been established to protect citizens from acid rains, hazardous trace elements, low-level radiation, fly ash, and polluting particulates that cause significant respiratory complications.

the Examiner pointed out that neither he nor the Director had the power to make the statutory change recommended by Ims, and urged him to speak with his legislators about it.*

17. Martha Ballou stated that she supported IMs entirely, relating that her experience had shown, by and large, that public participation under the present system "is a farce". However, her experience related primarily to rate proceedings, not Certificate of Need proceedings. She did, however, tie the two together by pointing out that individual wage earners are being asked to hold their wage demands down to 7%, and thus, utility costs ought to be held down to that same figure. She stated:

> If we're trying to hold to a 7% increase in utility costs, we would like to go on record as opposing anything that will increase costs utilities have to pay in terms of regulation.

She also argued in favor of an expanded role for consumers in energy decision-making generally.

18. The sole written comment was submitted by Wendell G. Bradley, an assistant professor of physics at Gustavus Adolphus College.

Bradley stated that lie was familiar with Certificate of Need proceeding!:;, having in some and having reviewed the record in others. He urged that any additional funds that might he expended in such hearings would best he spent financing public participation as opposed to financing the Agency's Staff.

Agency Response to Public Comments

19. The Agency representatives made a number of responses to the public comments. They included the following:

a. in order Lo implement funding of public participation in Certificate of Need proceedings, the Agency would have to obtain specific statutory authority from die Legislature.

b. The application fee is used to pay for staff review of the application, publishing notices of hearings in local newspapers, travel, hearing examiner expenses, and court reporter expenses. If the proposed amendment is not adopted, the agency will be faced, in lengthy or controversial hearings, with either limiting its involvement or funding costs in excess of the applica-

tion fee out of state tax dollars.
Focussing on the second of these responses, David Jacobson testified that
the application fees go into the state treasury, and the dollars which are
spent in processing a certificate are amounts budgeted to the agency in

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*Ims' propoosal is presented here for the Director's information.

the state's budgetary process. Therefore, strictly speaking , the Agency could has) spent more on a given application than was received by the fee. However, due to the "pay for yourself" philosophy of the program ci-ted earlier, Jacobson felt constrained, as manager of the budgeted dollars to stay within the applicatioi fee as much as possible.He stated that he believed it to be imperative that the Agency develop a Lull record on any application, and that in large hearings, this has lead to (and is expected to lead to, absent any change) "overspending". Jacobson believed at such overspending was necessary, but that at the present time, it was fin-anced from the state treasury, and ultimately by state taxpayers. If the amendment were adopted, it will be financed by applicants, and ultimately, their ratepayers.

Discussion

20. The basic questions to he answered in this proceeding are whether the Agency has justified its proposed deletion of the $50,000 maximum fee presently contained in the rule. The specific criteria to be applied are whether the Agency has demonstrated (a) the need for the deletion and (b) the reasonableness of the deletion.

21. With respect to need, the legislature's action on S.F. 2 presents the Agency with a situation where the statute sets the maximum fee at $100,000 for certain facilities, but the rule limits the tee to $50,000. This legislative change alone would be an adequate justification of need for the rule to be changed.

In addition, the Agency's proposal is certainly within the spirit, if not the letter, of Minn. Stat. sec. 15.0412, subd. 1 (1978), the statute which prohibits duplication of statutory language unless it is determined that such duplication is crucial to die ability of an affected person to comprehend the meaning and effect of a rule. Duplication is not required in this case.

22. The final argument with respect to need merges into an argument with respect to reasonableness, and it will he treated under both headings here. That is the argument presented by the public comments opposing any changes which would increase utility rates. ibis is countered by the Agency's belief that it is important to spend as much as is necessary to

have an adequate record in Certificate of Need proceedings at the expense, if necessary, of applicants and their ratepayers.

A large portion of the application fees paid by applicants is spent on salaries for Agency personnel who review applications for- and make independent reommendations at the hearings. While the Examiner is aware of Certificate of Need proceedings in which public participants have played a significant role in opposition to applications, in the one proceeding in which he has functioned as an Examiner, it was the Agency Policy Analysis Staff who were the only opposition. It Ims and Ballou support the concept of the Agency staff doing a thorough job in connection with every application which is filed, then the question becomes who is to pay for the staff work. A similar question may be raised with respect to the hearing examiner's expenses. If there is to he a thorough and fair

hearing, who is going to bear the costs? It appears that the only choices are the applicant (and its ratepayers) or the State (And it,-, taxpayers) . Ims, supported by Ballou and Bradley, would have the State pay for public participation in the process. Absent such publicly-funded participation, they believe that the process is not meaningful, and therefore, is a waste of ratepayers' money. Can it be said that it is both needed and reasonable that ratepayers bear the costs of these hearings, or should taxpayers?

The Examiner believes that the legislature has answered this question in favor of ratepayers, rather than taxpayers, footing the bill. In light of the legislative action, the Examiner finds that the Agency's proposal is reasonable.

Based upon the foregoing Findings, the Examiner hereby makes the following:

CONCLUSIONS OF LAW

1. Due, timely and adequate legal notice of the hearing was properly served and published by the Agency. All other substantive and procedural requirements of law and rule have been fulfilled with the possible exception of a failure to obtain prior approval of the Commissioner of Finance pursuant to Minn. Stat. sec. 16A.128, but see Finding No. 10.

2. The Agency has demonstrated its statutory authority to adopt the proposed rule amendment.

3. The Agency has demonstrated both the nee[] for and reasonableness of the proposed rule amendment.

Based upon the foregoing, the Examiner hereby respectfully makes the following:

R E C 0 M M E N D A T I 0 N

That the proposed amendment be adopted.

Dated this 31st day of May, 1979.

ALLAN W. KLEIN
Hearing Examiner

M E M OR A N D U M

Ims, Ballou and Bradley did show, in the mind of the Examiner, the frustration felt by members of the public in marshalling the finances and technical expertise necessary to play a full and meaningful role in complex hearings, whether they be rate hearings, power plant site hearings, or Cer-

tificate of Need proceedings. The Legislature can respond to this frustra-
tion in any number of ways, but clearly two choices are (a) to adopt Ims'
and Bradley's suggestion, and somehow fund public participation directly,
or (b) fund state agencies so that they may speak for the public. For
example, there is an activity within the Consumers Services section of the
Department of Commerce, funded by the State Legislature, which is charged
with the responsibility for representing and furthering the interests of
residential utility customers in rate proceedings. Similarly the power

plant siting staff, its advisory committees and the public advisor,* are charged with representing the public interest in power plant siting matters. Finally, as has been noted above, the Policy Analysis Staff of the Agency has undertaken to act as an independent advocate of the public interest in Certificate of Need proceedings. If members of the public are unsatisfied with these legislative choices, then they ought to petition their legislators for a change. But they must recognize that the power to make such a change ties not in the Examiner, nor in the Director of the Agency, but rather in the Legislature.

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*S.F. 2, the new law passed in the Special Session, created a similar position for Certificate of Need proceedings. The Director of the Agency is to designate one of his employees "whose duty shall he to facilitate citizen participation in the hearing process." This is an example of the power of the legislature to act in response to suggestions for improvements in the process.